

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE JOSEPH SZYMANSKI,

Defendant-Appellant.

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UNPUBLISHED

March 10, 2005

No. 252378

Wayne Circuit Court

LC No. 03-004408-01

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to eighty to three-hundred months in prison for the assault conviction, two to five years in prison for the felon-in-possession conviction, and two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's first argument on appeal is that he was denied his constitutional right to remain silent when his pre-arrest silence was offered as substantive evidence of his guilt and when the prosecutor urged the jury, during his closing argument, to use defendant's silence as evidence of his guilt. We disagree.

Defendant failed to object to the evidence at trial and to the prosecutor's comments. When reviewing an unpreserved issue, this Court reviews for plain error affecting a defendant's substantial rights, and reversal is warranted only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

The right against self-incrimination prohibits a prosecutor from commenting upon a defendant's silence in the face of an accusation. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). However, the right is not implicated when the silence occurred before any police contact. *Id.* Thus, a prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true. *Id.*

Here, Investigator Brown testified with respect to a voluntary statement given by defendant after *Miranda*<sup>1</sup> warnings were provided. On appeal, defendant objects for the first time to the following colloquy between Brown and defendant during the interrogation as presented to the jury: “Question: Why didn’t you talk to the police about this incident that night? Answer: Other employees advised me not to talk to the police and stay hidden. I don’t want to mention any names.” Defendant also objects for the first time to the prosecutor’s subsequent commentary during his closing argument, in which he stated, “But he didn’t think it was important to tell his version of what happened to the police . . . . If he was a victim of a crime . . . how come he didn’t take the opportunity to tell the police?”

The prosecutor was commenting on defendant’s pre-arrest failure to talk to or contact the police. This silence is being offered to show that the version of events that defendant reported to Brown are probably not true, because if defendant’s version were true, defendant would have reported the events to the police on the night of the incident. Therefore, pursuant to *Lawton*, the prosecution’s comments about defendant’s silence did not violate defendant’s constitutional right against self-incrimination because the prosecutor was referencing defendant’s pre-arrest/pre-*Miranda* silence. Thus, the trial court’s failure to suppress sua sponte Brown’s testimony or the prosecutor’s subsequent comments during his closing argument did not constitute plain error.

Defendant’s second argument on appeal is that he was denied a fair trial and the ability to effectively cross-examine the victim, James Elmore, because the police report he received was redacted, blocking out significant information, in particular, Elmore’s address. We disagree.

This issue was also not properly preserved. When reviewing an unpreserved issue, this Court reviews for plain error affecting a defendant's substantial rights, and reversal is warranted only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines, supra* at 763, 774.

A defendant's constitutional right to confront a witness is violated when unreasonable limitations are placed on his opportunity to test the truthfulness of the witness’ testimony. *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998). A criminal defendant has a due process right to access certain information possessed by the prosecution. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). This includes information that could be used to impeach a witness. *Id.* The prosecution is under a duty to disclose any information that would materially affect the credibility of his witness. *Id.*

Here, defendant cross-examined Elmore without limitation, and he could have further cross-examined Elmore regarding specifics and details as to Elmore’s place of residence in relation to the return address on the letter written to Lisa Burleson. Defendant could have also questioned others about Elmore’s address. Elmore testified that he did not live in the area of the return address listed on the letter. Defendant is apparently speculating that the address for Elmore listed in the police report matched the return address on the letter, otherwise there could be no claim of materiality. Assuming this to be true, despite the lack of any evidence in support,

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

the undisclosed/redacted information from the police report would not have materially affected Elmore's credibility because anyone could have written the letter and put Elmore's return address on it. Moreover, there is no indication that the address was redacted in an attempt to prevent defendant from acquiring information damaging to Elmore's credibility. Even if the return address on the letter to Burleson from "J.D." was identical to Elmore's address, because Elmore testified that he never went by "J.D.," that he did not know Burleson's address, and because defendant did know Lisa's address, a reasonable juror could conclude that defendant wrote or had someone else write the letter from "J.D." to Burleson. Therefore, the trial court did not commit plain error when it failed to rule sua sponte that defendant was denied his due process rights when he received a police report that had redacted Elmore's address.

Defendant's final argument on appeal is that the trial court abused its discretion when it erroneously admitted as evidence a letter supposedly written by defendant, which error was not harmless. We disagree.

When reviewing a claim that the trial court improperly admitted evidence, this Court reviews for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, decisions concerning the admission of evidence often involve preliminary questions of law, e.g., whether a rule of evidence precludes admissibility of the evidence, and questions of law are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court's decision on a close evidentiary question does not amount to an abuse of discretion. *People v Geno*, 261 Mich App 624, 632; 683 NW2d 687 (2004). The harmless error statute, MCL 769.26, presumes that a preserved, non-constitutional error is not a ground for reversal unless, after an examination of the entire cause, it affirmatively appears that it was more probable than not that the error was outcome determinative. *Lukity*, *supra* at 495.

To be properly authenticated, the evidence must establish that the proffered matter in question is what its proponent claims. MRE 901(a); *People v Howard*, 226 Mich App 528, 553; 575 NW2d 16 (1997). A document may be authenticated by testimony from a witness with knowledge "that a matter is what it is claimed to be." MRE 901(b)(1). Additionally, authentication of a writing may be based on "[n]onexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation." MRE 901(b)(2). Furthermore, authentication can be satisfied by a comparison by the trier of fact with handwriting specimens, which have been authenticated, or by the distinctive characteristics contained in the letter itself, taken in conjunction with other circumstances. MRE 901(b)(3) and (4); *People v Martin*, 150 Mich App 630, 637-638; 389 NW2d 713 (1986). The methods of authentication or identification in MRE 901(b) are presented "[b]y way of illustration only, and not by way of limitation[.]" MRE 901(b).

Here, Burleson was not familiar with defendant's handwriting as she had never seen it before. Furthermore, there were no comparisons to handwritten specimens of defendant, nor was a witness brought in who could identify the handwriting as that of defendant. Though defendant knew Burleson's address because he had previously dated her, and the letter contained defendant's name and prison address as the return address and was signed "E," Burleson did not testify to any distinctive characteristics in the letter that would prove that the letter was actually written by defendant, i.e., the letter did not contain specific information that only defendant would have known about. There was no evidence indicating that Burleson's address was unlisted or that the jail address was not ascertainable. The possibility remains that someone else

could have written the letter and put defendant's name and return address on it. Therefore, we find that the trial court improperly admitted the letter.

However, because there was sufficient evidence to convict defendant without the improper evidence, we find that the error was not outcome determinative. The evidence reflects that Rodney Williams and Burleson saw a man wearing a black leather jacket walking toward Elmore, that defendant, who was wearing a black leather jacket, approached Elmore in an angry manner telling him to leave the parking lot, that Elmore and defendant started scuffling, and that defendant shot Elmore. All testifying witnesses heard a gun shot, Elmore indeed suffered a gunshot wound, and Williams and Elmore, who were in the parking lot, said that no one else was present. Therefore, any error was harmless and reversal is not required.

Furthermore, we find that defendant has abandoned his argument, set forth in the table of contents and statement of issues presented, regarding the trial court abusing its discretion by admitting testimony about "stipple found on the victim's pull over," because defendant failed to substantively address this argument in his brief. Failure to brief a question on appeal "is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Affirmed.

/s/ Brian K. Zahra  
/s/ William B. Murphy  
/s/ Mark J. Cavanagh